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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

THE PEOPLE, Plaintiff and Respondent, v. JOSE VENEGAS, Defendant and Appellant.	B267921 (Los Angeles County Super. Ct. No. BA425783)

APPEAL from a judgment of the Superior Court of Los Angeles County, Kathleen Kennedy-Powell, Judge. Affirmed.

Judith Kahn, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Senior Assistant Attorney General, Victoria B. Wilson, Supervising Deputy Attorney General, Viet H. Nguyen, Deputy Attorney General, for Plaintiff and Respondent.

During an audiotaped police interview, defendant and appellant Jose Venegas (defendant) confessed to shooting 19-year-old victim Kenneth Deras (Deras). Defendant, a member of the Metro 13 criminal street gang, told the police he shot Deras, a member of rival gang South Side Montebello, in self-defense. The claim of self-defense was not the defense at trial, however; instead, defendant argued he was not the shooter and falsely confessed to the contrary only under pressure. The jury rejected that defense and found defendant guilty of first degree murder. In this appeal from his conviction, we consider defendant's challenge to the admission at trial of certain cell-phone-related evidence, as well as defendant's contentions that the prosecution committed prejudicial *Griffin*[1] error (i.e., commenting on defendant's decision not to testify) and improperly displayed a slide not in evidence during closing argument.

I

A

The conduct that resulted in the murder charge was partly captured by video surveillance cameras and partly seen by two witnesses who were with victim Deras at the time of the shooting: Alicia Hernandez (Hernandez) and her aunt Julie Torres (Torres).

In the evening on August 18, 2012, Deras, Hernandez, and Torres stopped at a 7-Eleven to get something (non-alcoholic) to drink while on the way to Walmart. Hernandez and Torres had both used methamphetamine that day. The 7-Eleven was within

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[1] *Griffin v. California* (1965) 380 U.S. 609 (*Griffin*).

South Side Montebello gang territory, and Deras did not have a weapon when he accompanied Hernandez and Torres.

When Deras and the two women arrived at the 7-Eleven, Deras and Torres went inside the store to make a purchase while Hernandez remained outside and smoked a cigarette. As Deras and Torres entered the 7-Eleven, Hernandez noticed a young Hispanic man near the store's entrance who was wearing baggy blue clothing and appeared to her to be a gang member (defendant would later admit in his statement to the police that he was the young man).[2] The young man looked in Deras's direction, and Hernandez thought the man was "mad-dogging" Deras. After Deras and Torres entered the store, the young man got into the back seat of a black car in the 7-Eleven parking lot, and the car drove off.

Within at most minutes, the young man who had left in the black car came walking back to the 7-Eleven parking lot. The man walked past the 7-Eleven's entrance and stood waiting outside while "look[ing] very fidgety" and "messing with his pants." Hernandez believed the young man might "hit up" Deras, and she tried to get his attention inside the store, but Deras never looked in her direction. When Deras and Torres paid for their items and exited the store, the young man approached Deras and aggressively asked him where he was from. Deras replied he was "from" South Side Montebello. The young man then reached for a "revolver-style" gun in his waistband, Deras

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[2] Torres similarly described the man who shot Deras as wearing a blue shirt and blue jeans. However, when police showed her the 7-Eleven surveillance video and asked if the man depicted wearing blue clothes was the shooter, she said no.

put his hands up in the air, the man pointed the gun at Deras, and Hernandez turned away and ducked behind a car to seek cover. Hernandez and Torres then heard multiple gunshots and saw Deras stumble to the ground.

Hernandez crawled over to where Deras fell and realized he had been shot because she saw "a bunch of blood just kind of puddling up by his head" (a later autopsy revealed he had sustained a fatal wound from a bullet that went through his left arm and penetrated the left side of his chest). Paramedics and police officers arrived on the scene shortly after Deras had been shot. By then, the young man who shot Deras had fled the area by running back to the same black car that had left the parking lot earlier but was still nearby.

B

Police investigation at the scene of the shooting did not turn up the gun used by the shooter. The police did recover two bullet fragments at the scene, and the medical examiner who performed an autopsy on Deras recovered another bullet from his body. Forensic testing of one of the bullet fragments recovered from the scene and the bullet recovered from Deras's body indicated both could have been fired from a .38 special caliber firearm, a .38 Smith and Wesson caliber firearm, or a .357 magnum caliber firearm. The characteristics of the fired bullets indicated it was possible they had been fired from an M206 Armscor .38 special caliber revolver, as well as several other firearm models made by other manufacturers.

The investigation into Deras's killing remained open for roughly two years as investigators attempted to figure out the name of the young man in blue seen on surveillance video footage

they recovered from the 7-Eleven. Further investigative efforts led detectives from the Los Angeles County Sheriff's Department to defendant (who was then in custody on another matter), and the detectives interviewed him in June 2014. The interview was audio-recorded.

After reading defendant his *Miranda*[3] rights, the detectives confronted defendant with the 7-Eleven surveillance video footage. Defendant readily acknowledged he was depicted in the video as the man wearing blue clothing, and he repeatedly confirmed throughout the interview he was present at the 7-Eleven at the time of the shooting—stating at one point, "I'm not denying that I was . . . there, . . . that's clearly me." But defendant initially maintained he "didn't see nothing" and "didn't shoot nobody." Employing what they would later refer to as "ruses," the detectives exaggerated the extent of the incriminating evidence they had uncovered (telling defendant, for instance, there was additional video footage that showed him shooting Deras when there was not) and asked defendant whether he shot Deras in self defense. Defendant eventually confessed he shot Deras with a .38 caliber revolver that he later threw away. Picking up on the detectives' earlier suggestion, however, defendant claimed the shooting was in self-defense: as defendant told it, Deras originally had the gun, defendant wrestled the gun away from Deras, and defendant then fired at Deras ("[t]wice, I think") because "[i]t was either me or him."

The Los Angeles County District Attorney charged defendant with murder in a single-count information. The information further alleged the murder was committed for the

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[3] *Miranda v. Arizona* (1966) 384 U.S. 436 (*Miranda*).

benefit of, at the direction of, and in association with a criminal street gang (Pen. Code, § 186.22, subd. (b)(1)(C)), and that defendant personally discharged a firearm causing Deras's death (Pen. Code, § 12022.53, subd. (d), (e)(1)).

The murder case against defendant proceeded to trial. Hernandez and Torres testified, and the prosecution also introduced in evidence the 7-Eleven video surveillance footage and defendant's recorded interview in which he admitted shooting Deras. Significantly for purposes of this appeal, the prosecution also sought to introduce (1) evidence regarding the location of defendant's cell phone on the night of the shooting, determined by using historical cellular tower data (hereinafter, cell site evidence); and (2) evidence of certain text messages and photos found on defendant's phone that depicted or referred to firearms. At defendant's request, the trial court held a hearing outside the presence of the jury to consider the admissibility of both categories of evidence.

1

Los Angeles County Sheriff's Department Crime Analyst Romy Haas (Haas) testified with respect to the cell site evidence the prosecution intended to offer. Haas explained she had been a crime analyst for nearly seven years and received approximately 30 to 40 hours of specific training on "cell phone toll analysis and mapping," with at least 100 hours of practical application "doing it every single day on hundreds of cases." She explained that a cell phone will send a radio signal to physical cell towers when placing calls and sending messages, and that a cell phone will communicate with the tower that has the strongest, most direct signal, which is usually the closest tower to the phone unless

there are geographic features that block communication or the closest cell tower is overloaded with traffic. For this case, investigators provided Haas with AT&T cell phone records, obtained via a search warrant for defendant's cell phone number, to analyze for location information.

Using the AT&T records and an FBI database that documents the geographical location of cell towers in past years (Deras's murder took place in 2012), Haas plotted the location of the cell towers used by defendant's cell phone on the night of Deras's shooting, including a cell tower in the area of the 7-Eleven where Deras was shot. The AT&T records also included detail (known by the technical term "azimuth") about the particular "sector" of the cell phone towers used by defendant's cell phone (AT&T cell towers have three sides arranged in a triangular shape, with one or more sectors on each side). Haas used the sector information to narrow somewhat the location of defendant's phone in relation to the location of the cell towers used. Haas cautioned, however, that she could not pinpoint the range of a cell tower's coverage, and that the diagrams she prepared concerning the coverage of the cell towers were just for "illustrative" purposes. In addition to preparing diagrams depicting cell tower usage by defendant's phone on the night in question, Haas also used a computer software program to prepare a video that showed, on a map of the relevant geographic areas, a time-elapsed progression of cell towers used by defendant's phone throughout that night.

At the conclusion of Haas's hearing testimony, the defense objected to admission of the cell site evidence. Defense counsel contended the cell site evidence was "irrelevant and more prejudicial than probative" because there was "no indicia of

reliability that depicts the frequency, the range or any type of reliable information other than an illustrative purpose . . . to cover the area of [the 7-Eleven]."

The trial court rejected this argument and ruled the cell site evidence would be admitted. The court found the evidence was probative, not prejudicial, and supported by sufficient foundation; the court further found the defense's objections to the illustrative nature of the location diagrams prepared by Haas went solely "to weight rather than admissibility." Defense counsel protested and asked the court if it would consider any briefing the defense could provide regarding the sufficiency of Haas's testimony and "case law regarding the limitations or what is permissible for law-enforcement to testify regarding historical data." The trial court agreed it would review any case law the defense might submit regarding "cell phone charting and mapping and so forth," but so far as the appellate record reveals, the defense submitted no additional briefing.

Testifying later in the presence of the jury, Haas described her qualifications and experience pertaining to cell site evidence. Haas also explained how cell phones communicate via radio frequencies with AT&T cell towers, and how the location of the cell towers, combined with historical records of when a given cell phone was communicating with a given cell tower, can provide information as to whether the phone was "in the area covered by that tower." Haas conceded the cell site data she analyzed could not reveal "exactly where or [on] what street the [phone] handset was" and that aspects of the map diagrams she prepared were for "illustrative purposes only." But based on her phone records and cell tower analysis, Haas determined defendant's cell phone was "within the area of Montebello" and communicated with the

AT&T cell tower that was closest to the 7-Eleven in question on the day of Deras's killing and at the approximate time of the shooting.[4]

2

Los Angeles County Sheriff's Department Detective Gerald Groenow testified outside the presence of the jury in connection with the prosecution's request to introduce text messages and photos from defendant's cell phone that depicted or referenced certain firearms. Detective Groenow was assigned to the Southern California High Tech Task Force, and he extracted information, including photos and text messages, from defendant's cell phone using software that downloaded the information into "extraction reports."

Detective Groenow testified about four text message conversations found on defendant's phone, with accompanying photos. All of the text conversations occurred after Deras's shooting (i.e., on August 27 and 28, 2012). In one of the text conversations, defendant and a contact designated in his phone with the name "El Primo" corresponded regarding a photo of an Armscor 206 six-shot revolver via messages stating: "I like my revolver primo. [¶] Me 2 primo. [¶] Nice I like that one if u ever want get it ghost let me get it. ??? [¶] It's a sexy bitch huh

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[4] Haas also testified concerning the cell towers used by defendant's phone after the time of the shooting. According to the phone records and her analysis, defendant's cell phone moved in a northerly direction, ultimately communicating with a cell tower in the area of the 210 Freeway between Altadena and La Cañada.

forsure." Another text conversation between defendant and "Li'l Rob" involved a picture of a firearm and an exchange of messages stating, among other things, "Na homie it's a 380 loko. [¶] . . . [¶] U dumping it? [¶] . . . [¶] Not right now u need one I change it 2 one of the homies I had a 38special 5shots." In yet another text conversation, defendant and "Gallo" exchanged a photo of a firearm and associated messages stating: "Like my new toy homie it's a 380 one extended clipp 13 shots all together Firme no. [¶] Its firme homie. I got rid of my 9 for 150. [¶] Esta la cambie [this I exchanged] 4 a 38 I had." And in a fourth text conversation, messages between defendant and "Water" included a photo of a firearm and texts stating: "U like my new toy??? [¶] Hahaha what kind? [¶] It's a thunder 380. Nice ha I'll be over maybe on fri."[5]

The prosecution argued the texts and photos extracted from defendant's phone indicated "defendant had exchanged a revolver, a six-shot or a five-shot as he described it, and instead got a new toy, a .380 caliber firearm." Because the evidence at trial established Deras was killed with a revolver, and possibly a .38 or .38 special caliber revolver, the prosecution believed the text message conversations were probative of defendant's possession of a firearm that could have been the weapon used to kill Deras. Defendant, on the other hand, argued the text conversations "between two people whose identity is unknown is

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[5] The prosecution also identified certain other text message conversations included in the phone extraction report that it would seek to admit at trial to establish, among other things, the cell phone belonged to defendant and defendant was interested in acquiring a .357 caliber gun.

not relevant to whether or not there was a shooting that occurred on the 18th of August and whether or not [defendant] was the one who did it." Defendant also contended the discussion and photos of a .380 semi-automatic firearm were irrelevant because there was no evidence such a firearm was used in Deras's killing and the photos were more prejudicial than probative.

The trial court ruled the text message conversations (and associated firearm photos) would be admitted in evidence. The court explained its reasoning on the record: "[T]here is the potential for prejudice, but it also is extremely probative because the type of weapon that was used in this case, according to the evidence that we've heard, is that it was a revolver. And a few days later, here are messages from [defendant] about exchanging or selling a revolver of a similar type to the type that was included in those type of weapons that . . . were utilized in this particular offense, based upon the ballistics evidence. [¶] So I mean, I do think it is probative, but I also understand the prejudice. And so what I'm suggesting is that a limiting instruction may be something that is appropriate in terms of perhaps mitigating the possibility of the jury jumping to conclusions [with regard to defendant's possession of firearms generally]. [¶] You may decide that you don't want that because that just brings more attention to it in the first place. . . . But I do think that it's extremely probative, despite the prejudice."

When Detective Groenow later testified in the presence of the jury, he explained the process he undertook to extract information from defendant's cell phone. He then described the aforementioned four text conversations (and others) for the jury, explaining whether defendant's phone or the phone user on the

other end of the conversation sent particular lines of text or the firearm photographs in question.[6]

C

The defense at trial was mistaken identity. During the defense case, defendant called a University of San Francisco law and psychology professor as an expert witness in police interrogation techniques. He testified about certain techniques interrogators use that increase the risk of a false confession (including exaggerating the amount of incriminating evidence), but he agreed false confessions by suspects were "not the norm." Defendant also called a forensic identification specialist employed by the Los Angeles County Sheriff's Department as a witness, and she testified defendant's fingerprints did not match fingerprints lifted from glass surfaces at the 7-Eleven on the night Deras was shot.

During closing argument, the defense conceded "something did happen" at the 7-Eleven but argued "[defendant] is not the shooter" because "it wasn't him at the location." The defense emphasized neither Hernandez nor Torres identified defendant as the shooter. The defense argued the jury should disregard the cell site evidence because Haas conceded "[s]he does not know exactly where the handset could be" and the cell site diagrams she prepared were "only illustrative." The defense asserted the text message conversations concerning firearms were not

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[6] Defendant sent the texts (or so the jury could reasonably infer) stating he "had a 38special 5shots" and asking whether "Gallo" liked his "new toy," a .380 caliber gun, that he exchanged or traded "4 a 38 [he] had."

probative of guilt because there was no evidence the firearms were ever recovered by the police and the conversations took place *after* Deras's shooting. The defense acknowledged there was video surveillance evidence at the 7-Eleven, but argued the jury could watch the video and determine for itself whether the man shown in blue clothing had tattoos where defendant had tattoos (or whether, instead, what could be seen in the video were merely shadows, not tattoos). And the defense argued the jury should give no weight to defendant's admission to shooting Deras because it was a "false confession by the wrong person."

In rebuttal, the prosecution addressed, among other points, defendant's argument that the jury should determine for itself whether the young man wearing blue clothing in the 7-Eleven surveillance video was defendant. The prosecution argued: "[The d]efense goes on about the defendant's horn tattoos [on his forehead]. Well let's just clarify that. We don't even know when he—his tattoos were a progression. He has been adding tattoos progressively over time since the time of the murder. [¶] And so the sequence and the dates on which he added these tattoos, he could probably explain that for us—" At that point, defense counsel interposed an objection and the trial court sustained it. Defense counsel did not, however, ask the trial court to admonish the jury in response to the objected-to statement.

When closing arguments were complete, the jury retired to deliberate and found defendant guilty of first degree murder, with true findings on the associated gun and gang enhancements. The trial court sentenced defendant to 50 years to life in prison.

II

Defendant's appeal challenges the prosecution's evidence and argument. As to the prosecution's evidence, defendant argues the trial court abused its discretion in admitting the cell site evidence and in permitting the prosecution to introduce evidence of the text messages and photos involving guns found on his phone, which he claims were unduly prejudicial.[7] We reject both evidentiary contentions. The cell site evidence was not a "new scientific technique" that would have obligated the trial court to make findings pursuant to the rule adopted in *People v. Kelly* (1976) 17 Cal.3d 24 (*Kelly*),[8] and we find no fault in the trial court's discretionary decision that the probative value of the texts and photos—evidence that had some tendency to show defendant possessed the murder weapon—was not substantially outweighed by a danger of undue prejudice. As to the prosecution's

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[7] Defendant's opening brief included an additional argument: that the cell site evidence should have been excluded because law enforcement obtained the historical phone records from AT&T without a search warrant. The Attorney General's brief correctly explains defendant is factually mistaken on this point—the phone records were indeed obtained pursuant to a search warrant. We accordingly do not discuss this contention further.

[8] "Until 1993, this rule was generally known in this state as the *Kelly-Frye* rule because [our Supreme Court] in *Kelly* had relied on the reasoning of a federal appellate court decision, *Frye v. United States* (D.C. Cir.1923) 293 Fed. 1013 (*Frye*). In 1993, the United States Supreme Court held that the Federal Rules of Evidence had superseded *Frye* (*Daubert v. Merrell Dow Pharmaceuticals, Inc.* (1993) 509 U.S. 579, 587[ ]), and our state law rule is now referred to simply as the *Kelly* test or rule." (*People v. Bolden* (2002) 29 Cal.4th 515, 545 (*Bolden*).)

argument, defendant forfeited his claim that the prosecution committed *Griffin* error when stating defendant "could probably explain" the progression in his tattoos, and in any event, the isolated remark did not contribute to the verdict obtained. Defendant also complains about a slide apparently used during the prosecution's closing argument, but the record is not clear on what was actually displayed. Regardless, the argument is forfeited for failure to raise an adequate objection.

A

"In [*Kelly*], [our Supreme Court] held that evidence obtained through a new scientific technique may be admitted only after its reliability has been established under a three-pronged test. The first prong requires proof that the technique is generally accepted as reliable in the relevant scientific community. ([*Kelly*, *supra*, 17 Cal.3d] at p. 30.) The second prong requires proof that the witness testifying about the technique and its application is a properly qualified expert on the subject. (*Ibid.*) The third prong requires proof that the person performing the test in the particular case used correct scientific procedures. (*Ibid.*) [The Supreme Court] further held that proof of a technique's general acceptance in the relevant scientific community would no longer be necessary once a published appellate decision had affirmed a trial court ruling admitting evidence obtained by that scientific technique, 'at least until new evidence is presented reflecting a change in the attitude of the scientific community.' (*Id.* at p. 32.)" (*Bolden*, *supra*, 29 Cal.4th at pp. 544-545; accord, *People v. Cordova* (2015) 62 Cal.4th 104, 127 (*Cordova*); *People v. Leahy* (1994) 8 Cal.4th 587, 605 [*Kelly* rule applies only to new scientific techniques, in other words,

"'that limited class of expert testimony which is based, in whole or part, on a technique, process, or theory which is *new* to science and, even more so, the law'"].)

We have parsed the record, and the objections to the cell site evidence raised by the defense below did not preserve the *Kelly* challenge that defendant now raises on appeal. (*People v. Ochoa* (1998) 19 Cal.4th 353, 414 [failure to object to evidence on *Kelly* grounds in the trial court means *Kelly* claim not preserved for appeal] (*Ochoa*).) In the defense's pretrial motion in limine and during the Evidence Code section 402 hearing, the defense made no objection that invoked the *Kelly* rule by name or in substance—despite defense counsel having expressly objected to other, unrelated evidence on "*Kelly*/*Frye*" grounds the very same day the court held the Evidence Code section 402 hearing. There was also no questioning of analyst Haas about the general acceptance of her techniques in the scientific community—the key issue for *Kelly* analysis—nor was there any mention of that issue when counsel argued about the admissibility of the evidence. Indeed, the closest defense counsel came to raising a *Kelly* issue (which was not very close) was her objection "to the foundation that was established" and her query as to whether the trial court would reconsider its ruling if she were to "bring case law regarding the limitations or what is permissible for law-enforcement to testify regarding historical data . . . ." Although the court stated it was willing to review any authority the defense might submit despite having had prior cases where similar cell site data had been admitted, defense counsel never provided the court with the authority she said she would attempt to find. The *Kelly* issue is therefore forfeited.

Like the defendant in *Ochoa*, however, defendant asserts that if we find his *Kelly* claim forfeited, his trial attorney's failure to object on *Kelly* grounds constituted ineffective assistance of counsel. But defendant's ineffective assistance claim necessarily fails because a *Kelly* objection would have been meritless. (*People v. Garlinger* (2016) 247 Cal.App.4th 1185, 1188 (*Garlinger*); *People v. Bradley* (2012) 208 Cal.App.4th 64, 90 ["Failure to raise a meritless objection is not ineffective assistance of counsel"].)

Defendant recognizes the Court of Appeal in *Garlinger* rejected the *Kelly* argument he makes in this case. He is right, of course: *Garlinger* holds "expert testimony explaining a cell phone signal received by a certain side of a cell tower must have come from that side of the tower and in the general vicinity of the tower does not describe a new scientific technique subject to the standard set forth by our Supreme Court in . . . *Kelly* . . . for admitting the results of such techniques." (*Garlinger*, *supra*, 247 Cal.App.4th at p. 1187.) Defendant urges us not to rely on *Garlinger* because it is wrongly decided, but we find the decision persuasive and reach the same conclusion in this case for substantially the same reasons. In particular, we agree "the transmission of radio signals from one place to another is a technology that has been around for more than a century" and "while cell phones are relatively new devices, the methodology is not new. Cell phones operate like 'sophisticated radios' by sending and receiving a radio signal to and from a cell tower and base station in their general vicinity." (*Id.* at pp. 1195-1196; *In re Application for Telephone Information Needed for a Criminal Investigation* (N.D. Cal. 2015) 119 F.Supp.3d 1011, 1013 ["Cell phones operate through the use of radio waves"]; *United States v. Evans* (N.D. Ill. 2012) 892 F.Supp.2d 949, 952 [summarizing

testimony that cell phones determine which cell tower has the strongest signal using radio frequency waves] (*Evans*); see also *Cordova*, *supra*, 62 Cal.4th at p. 127 [more sophisticated method of DNA testing "is merely another in a series of improved ways to apply long-accepted science, not a new scientific technique in the *Kelly* sense"].)

Defendant's efforts to attack the *Garlinger* decision are unpersuasive. He contends *Garlinger* relies on cases where "there was no challenge *whatsoever* to the cell phone tracking evidence," but the *Garlinger* court cited those cases merely to buttress the case's core holding (cell site evidence does not involve a new scientific technique)—not as a specific, freestanding invocation of the exception that *Kelly* analysis is not required for new scientific techniques once a published appellate decision has sanctioned evidence obtained by use of that technique. (*Garlinger*, *supra*, 247 Cal.App.4th at p. 1196 [citing cases]; see also *Cordova*, *supra*, 62 Cal.4th at p. 127.) Defendant also relies on *Evans*, a case that held an FBI Special Agent's testimony concerning "the location of a cell phone using the theory of granulization" (*Evans*, *supra*, 892 F.Supp.2d at p. 952) was insufficiently reliable to be admissible, but the *Garlinger* decision distinguishes *Evans* for reasons that apply equally here. (*Garlinger*, *supra*, at p. 1198 ["We need not determine whether the district court in *Evans* . . . [was] right because our case does not involve granulization theory. Unlike Special Agent Raschke, Detective Bearor did not purport to have estimated the coverage area of specific cell towers based on their proximity to other towers. Nor did he claim to have determined the location of defendant's cell phone based on his ability to predict overlapping coverage areas. Those were the salient aspects of granulization

theory found to be lacking in reliability"].) In this case, analyst Haas created diagrams and testified concerning the general location of defendant's phone at or near the time of Deras's killing and thereafter, and Haas disclaimed any ability to define the precise limits of cell tower coverage or to determine exactly where defendant's phone was located. Thus, even if a *Kelly* objection had been raised, the trial court's ruling would stand: the cell site evidence was admissible.

B

Section 352 of the Evidence Code gives a trial court discretion to exclude relevant and otherwise admissible evidence "if its probative value is substantially outweighed by the probability that its admission will (a) necessitate undue consumption of time or (b) create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury." A trial court has broad discretion when exercising its authority under Evidence Code section 352, and we review the trial court's determination for abuse of discretion. (*People v. Winbush* (2017) 2 Cal.5th 402, 469 (*Winbush*); *People v. Alexander* (2010) 49 Cal.4th 846, 912-913 [reviewing court assesses whether trial court's Evidence Code section 352 determination was an abuse of discretion by determining whether it "was outside the bounds of reason"].) Defendant argues the trial court should have excluded the text message conversations and associated firearm photos pursuant to Evidence Code section 352 because they "served only to depict [defendant] as a bad person who loved guns and, by implication, liked to kill." We hold there was no abuse of discretion in admitting the evidence.

The text message conversations in question permitted the jury to draw an inference that defendant possessed a pistol that may have served as the murder weapon (which was never found) but got rid of that weapon by trading it for another gun. Specifically, in text message conversations days after Deras's killing, defendant stated he previously had a "38 special, five shots" that he exchanged or traded for a .380 caliber gun, and ballistics evidence presented at trial established the murder weapon was likely a .38 special revolver, a .38 Smith and Wesson revolver, or a .357 magnum. In addition, defendant and "El Primo" exchanged texts concerning an Armscor 206 revolver, which an expert at trial stated was one of the firearm models that would make the rifiling markings found on the bullet fragments associated with Deras's shooting. This was all highly relevant evidence even though there was, of course, no guarantee defendant and his texting partners were in fact referring to the weapon used to kill Deras. (Evid. Code, § 210 [relevant evidence is evidence "having any tendency in reason to prove or disprove any disputed fact that is of consequence"]; *People v. Carpenter* (1999) 21 Cal.4th 1016, 1052 [evidence that the defendant possessed a gun that "might have been" the murder weapon but was not "necessarily" the murder weapon was admissible as relevant circumstantial evidence].)

As the trial court recognized, however, there was also some concomitant potential for prejudice in admitting the evidence. That was largely because the text conversations also made reference to, or included photos of, firearms that could not have

been the weapon used to kill Deras.[9] But considering the other gun references and photos as a whole, we cannot say the trial court exceeded the bounds of reason in determining that any danger of undue prejudice did not substantially outweigh the probative value of the text conversations. Indeed, we find it significant that the trial court offered to give a limiting instruction that would mitigate the danger of collateral prejudice but the defense did not submit a proposed instruction consistent with the trial court's offer. (See *People v. Smith* (2009) 179 Cal.App.4th 986, 1005-1006.) The trial court's balancing was not an abuse of its discretion.[10]

C

"'The applicable federal and state standards regarding prosecutorial misconduct are well established. "'A

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[9] We note, however, that one of these firearms, the .380 caliber handgun depicted in several photos, did have its own particular relevance. Defendant's text messages indicated he traded a .38 caliber gun he had (a gun model consistent with the gun used to kill Deras) for a .380 caliber gun (a gun model inconsistent with the gun used to kill Deras).

[10] Because we conclude there was no abuse of discretion, we find it unnecessary to discuss why the admission of the text message conversations did not result in a miscarriage of justice. But we do note there is no basis for defendant's suggestion that the trial court's Evidence Code section 352 ruling constitutes federal constitutional error. (*People v. Marks* (2003) 31 Cal.4th 197, 227 ["[A]pplication of ordinary rules of evidence like Evidence Code section 352 does not implicate the federal Constitution . . ."].)

prosecutor's . . . intemperate behavior violates the federal Constitution when it comprises a pattern of conduct "so egregious that it infects the trial with such unfairness as to make the conviction a denial of due process."'" [Citations.] Conduct by a prosecutor that does not render a criminal trial fundamentally unfair is prosecutorial misconduct under state law only if it involves '"'the use of deceptive or reprehensible methods to attempt to persuade either the court or the jury.'"' [Citations.]'" (*People v. Hill* (1998) 17 Cal.4th 800, 819.) Defendant presents two arguments seeking reversal based on asserted prosecutorial misconduct during closing argument; we reject both.

1

Defendant asserts the prosecutor committed *Griffin* error, a species of misconduct, during rebuttal argument when she remarked: "[T]he sequence and the dates on which he [i.e., defendant] added these tattoos, he could probably explain that for us[.]"[11] "Under the rule in *Griffin*, error is committed whenever

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[11] Defendant's opening brief can also be read to contend the prosecution committed *Griffin* error by arguing the defense failed to call logical witnesses. The prosecution's argument in this respect was proper, and we do not discuss it further. (*People v. Castaneda* (2011) 51 Cal.4th 1292, 1333 ["Although a prosecutor is forbidden to comment either directly or indirectly, on the defendant's failure to testify in his defense, the prosecutor may comment on the state of the evidence, or on the failure of the defense to introduce material evidence or to call logical witnesses"], internal quotation marks and citations omitted.)

the prosecutor or the court comments, either directly or indirectly, upon defendant's failure to testify." (*People v. Morris* (1988) 46 Cal.3d 1, 35; accord, *People v. Thompson* (2016) 1 Cal.5th 1043, 1117-1118 (*Thompson*).)

The general rule is that "'[i]n order to preserve a claim of misconduct, a defendant must make a timely objection and request an admonition.'" (*People v. Williams* (2013) 56 Cal.4th 630, 671; accord, *People v. Forrest* (2017) 7 Cal.App.5th 1074, 1081 [purpose of the requirement is to encourage defendants to bring errors to the attention of the trial court so they may be corrected].) Defendant objected to the challenged remark and the trial court sustained the objection, but defendant did not ask the trial court to admonish the jury to disregard the remark or to explain its impropriety. In the absence of a request for an admonition, and defendant having made no attempt to argue an admonition would have been futile, Supreme Court authority dictates we deem the issue forfeited. (*Winbush*, *supra*, 2 Cal.5th at p. 482 ["Although defendant objected, and his objection was sustained, he did not ask the court to admonish the jury to disregard the prosecutor's argument. Accordingly, he forfeited this challenge on appeal"]; *People v. Charles* (2015) 61 Cal.4th 308, 328 [same].)

Even if the *Griffin* error claim had been preserved, the Attorney General has persuasively demonstrated the asserted error here was harmless beyond a reasonable doubt. (*Chapman v. California* (1967) 386 U.S. 18.) ""'[I]ndirect, brief and mild references to a defendant's failure to testify, without any suggestion that an inference of guilt be drawn therefrom, are uniformly held to constitute harmless error.'" [Citations.]" (*Thompson*, *supra*, 1 Cal.5th at p. 1118.) Moreover, the evidence

of guilt on the sole contested issue at trial, the identity of the shooter, was very strong if not overwhelming. Defendant is correct that Hernandez and Torres did not identify him as Deras's shooter, but the prosecution had even better evidence: the repeated, clear admissions by defendant himself during the recorded interview with the detectives that he was the person depicted in the 7-Eleven video surveillance footage.[12] The jurors also could watch the surveillance video themselves and compare it to photos of defendant and their observation of him in court to form their own conclusions as to the identity of the shooter. Defendant also had a motive to kill Deras, a member of a rival gang, and while all this is strong evidence of guilt in its own right, the cell site and text conversation evidence provided further confirmation that defendant was the culprit.

2

Defendant additionally argues the prosecution committed misconduct during closing argument by displaying a PowerPoint slide during summation. The slide in question is not included in the record, so we can attempt to divine what occurred only by looking to the relevant portion of the trial transcript. We quote that portion below in full.

"[The Prosecutor]: But as they got closer, as [Torres] got to her driver's door, she's opening the door, she hears 'where you from?' So she looks up. And what does she see? This guy who

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[12] Trial counsel argued defendant falsely confessed, but defendant admitted the young man in blue was him even while he initially maintained he was not the man who shot Deras—before later confessing that he was.

she's described in a royal blue shirt, short sleeve, blue jeans, slightly darker blue jeans, a mustache, at the sidewalk saying to the defendant [*sic*] 'where you from?' What else did she tell us? The guy suddenly produces a gun. She's not some firearms expert. She's not going to sit there and describe, well, it was a semiautomatic with a 13-shot capability. Okay? She's not going to be able to say that. When asked by the detective—

[Defense Counsel]: Your Honor, I would object. This slide—it's nowhere in evidence. And it's—

The Court: Well, you superimposed a figure.

[The Prosecutor]: Right.

The Court: But that's not how it actually appeared.

[The Prosecutor]: Okay. But I'll explain to the jury.

He had—it was the gentleman in royal blue with dark blue jeans, short sleeve shirt produced—suddenly he's holding a gun. She described it to the detective when she was asked, 'Well, this style or like that style?' 'It was like that style, the revolver style.' Okay? That's the shape and style of gun that she saw.

And she explained that . . . [Deras] began to run away. He actually fell on her. She's explained that [Deras] actually fell on her.

[Defense Counsel]: This image again here is superimposed.

The Court: I'm sorry?

[Defense Counsel]: The image was just there superimposed the same photographs that—

The Court: Right. That's clear.

[The Prosecutor]: Demonstrative, Your Honor.

Because defense counsel did not object in a manner that clearly reveals the nature of the asserted problem with the

presentation slide, defendant is left to argue it was misconduct to use the slide because "the trial court acknowledged" the image on the slide was not how "it" actually appeared. Similarly handicapped by the absence of an objection that would preserve the issue for appeal, the Attorney General theorizes "it appears that the prosecutor used a slide of the murder scene with a superimposed image of either a revolver or [defendant] from the surveillance video footage."

We seriously doubt use of the slide was misconduct at all. (*People v. Centeno* (2014) 60 Cal.4th 659, 671 ["The use of charts, diagrams, lists, and comparisons *based on the evidence* may be effectively and fairly used in argument to help the jury analyze the case"].) But what is abundantly clear is that defense counsel neither made an objection on misconduct grounds in the trial court nor made any request that the trial court admonish the jury concerning the prosecution's use of the slide in question. We therefore deem the argument forfeited, and reject it on that basis. (*Winbush*, *supra*, 2 Cal.5th at p. 482; *People v. Covarrubias* (2016) 1 Cal.5th 838, 893-894 [holding claim forfeited because the defendant "did not object on the specific ground of prosecutorial misconduct that he now asserts on appeal"].)

DISPOSITION

The judgment is affirmed.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

BAKER, J.

We concur:

KRIEGLER, Acting P.J.

DUNNING, J.*

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* Judge of the Orange Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.